No. 93-1294

Supreme Court, U.S.
FILED
MAR 17 1994
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

GRAYDON L. GIBSON, OLETA GIBSON,

Petitioners,

v.

DALLAS COUNTY EDUCATION DISTRICT,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

PETER G. SMITH
ROBERT L. DILLARD III
NICHOLS, JACKSON, DILLARD, HAGER & SMITH, L.L.P.
1800 Lincoln Plaza
500 N. Akard Street
Dallas, Texas 75201
(214) 954-3333

Attorneys for Respondent

DAN MORALES
Attorney General of Texas

TONI HUNTER
Chief, General Litigation Division
Assistant Attorney General
General Litigation Division
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 463-2120

Attorneys for Intervenors

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Should this Court grant a Writ of Certiorari where the Fifth Circuit Court of Appeals has applied the Tax Injunction Act, 28 U.S.C. § 1341 (1993), to bar a suit by Texas taxpayers seeking a refund of State ad valorem taxes, on the basis that the retention of the tax, held invalid under the Texas Constitution, violates the due process clause of the Fourteenth Amendment to the United States Constitution and where the taxpayers have not demonstrated that the Texas courts have refused to entertain their Federal claim?

2. Should this Court grant a Writ of Certiorari where the Fifth Circuit Court of Appeals has applied the Tax Injunction Act, 28 U.S.C. § 1341, to bar a suit by Texas taxpayers seeking a refund of State ad valorem taxes, on the basis that the retention of the tax, held invalid under the Texas Constitution, violates the due process clause of the Fourteenth Amendment to the United States Constitution, and where the Texas taxpayers failed to establish the absence of a plain, speedy and efficient remedy under State law?

3. Should this Court grant a Writ of Certiorari where the Fifth Circuit Court of Appeals has applied the Tax Injunction Act, 28 U.S.C. § 1341, to bar a suit by Texas taxpayers seeking a refund of State ad valorem taxes, on the basis that the retention of the tax, held invalid under the Texas Constitution, violates the due process clause of the Fourteenth Amendment to the United States Constitution, and where the taxpayer claims are nonetheless

QUESTIONS PRESENTED – Continued

barred by the Eleventh Amendment to the United States Constitution?

4. Whether Teas afforded the Petitioners a meaningful opportunity to secure post-payment relief for taxes already paid pursuant to a tax scheme found invalid under the Texas Constitution?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

JURISDICTION 2

STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT 4

ARGUMENT 5

I. TAX INJUNCTION ACT BARS PETITIONERS' CLAIMS 5

II. TEXAS TAX CODE PROVIDES EFFECTIVE REMEDY 7

III. MCKESSON INAPPLICABLE 9

IV. ABSENCE OF FEDERAL QUESTION 11

V. ELEVENTH AMENDMENT BARS PETITIONERS' CLAIMS 12

CONCLUSION 13

TABLE OF AUTHORITIES

Page

Cases

American Trucking Ass'ns, Inc. v. Smith, 496 U.S. 167 (1990) 12

Brooks v. Bachus, 661 S.W.2d 288 (Tex. App. – Eastland 1983, writ ref'd n.r.e.) 8

California v. Grace Brethren Church, 457 U.S. 393, 408 (1982) 5

Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist., 826 S.W.2d 489, 524 (Tex. 1992) (*Edgewood III*) 2, 7, 12

Chevron Oil Co. v. Huson, 404 U.S. 97 (1971) 12

City of Houston v. Standard Triumph Motor Co., 347 F.2d 194, 199 (5th Cir. 1965), *cert. denied*, 382 U.S. 974 (1966) 7

Dallas County Appraisal District v. Lal, 701 S.W.2d 44, 47 (Tex.App. – Dallas 1985, writ ref'd n.r.e.) 8

Fair Assessment in Real Estate Ass'n, Inc. v. McNary, 454 U.S. 100, 116 (1981) 6, 9

Farias v. Bexar County Board of Trustees, 925 F.2d 866 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 193, 116 L.Ed.2d 153 (1991) 13

Franchise Tax Bd. v. Alcan Aluminum, 493 U.S. 331, 340-41 (1990) 7

General Electric Credit Corp. v. Midland Central Appraisal Dist., 808 S.W.2d 169, 171-72 (Tex. App. – El Paso 1991) 8

TABLE OF AUTHORITIES – Continued

Page

Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293, 299 (1943) 5

Great Northern Ry. Co. v. Sunburst Oil and Refinery Co., 287 U.S. 358 (1932) 12

McKesson v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18 (1990) 9, 10, 11

McQueen v. Bullock, 907 F.2d 1544 (5th Cir. 1990), *cert. denied*, 499 U.S. 919 (1991) 6

Redd v. Lambert, 674 F.2d. 1032, 1036 (5th Cir. 1982) 7

Rosewell v. LaSalle Nat'l. Bank, 450 U.S. 503, 522 (1981) 5, 6, 7, 9

Sax v. Votteler, 648 S.W.2d 661, 664 (Tex. 1983) 8

Smith v. Travis County Education District, 968 F.2d 453, 455-56 (5th Cir. 1992) 4, 7

Stem v. Ahern, 908 F.2d 1, 4 (5th Cir. 1990), *cert. denied*, 498 U.S. 1069 (1991) 13

Texas Architectural Aggregate, Inc. v. Adam, 690 S.W.2d 640, 643 (Tex. App. – Austin 1985, no writ) 8

Texas Pipeline Co. v. Anderson, 100 S.W.2d 754 (Tex. Civ. app. – Austin 1937, writ ref'd), *cert. denied*, 302 U.S. 724 (1937) 8

Woods v. Federal Home Loan Bank Board, 826 F.2d 1400 (5th Cir. 1987), *cert. denied*, 108 S. Ct. 1221 (1988) 9

TABLE OF AUTHORITIES – Continued

Page

STATUTES, CONSTITUTIONS, RULES

18 Tex.Reg. 5697 (1993) (codified at 19 TEX. ADMIN. CODE § 61.1001) (TEX. EDUC. AGENCY) 3

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1254(1) (1993) 2

28 U.S.C. § 1257 (1993) 6

28 U.S.C. § 1341 (1993) 4, 6, 13

Acts of 1991, 72nd Leg., 1st C.S., Ch. 20, 1991, Tex. Gen. Laws 381, amended by Act of May 27, 1991, Tex. Gen. Laws 1475; Tex. Educ. Code § 20.941 et seq 2

FED. R. CIV. P. 23 3

TEX. CONST. art. VII, § 3 2

TEX. CONST. art. VIII, § 1(e) 2

TEX. TAX CODE ANN CH. 42 (Vernon 1992 & Supp. 1994) 9

TEX. TAX CODE ANN. (Vernon 1992) 8, 9

TEX. TAX CODE ANN. ch. 41, 42 8

TEX. TAX CODE ANN. § 41.41(9) (Vernon 1992) 9

U.S. CONST. art. VIII, cl. 3 10

U.S. CONST. amend XI 12, 13

U.S. CONST. amend. XIV 3, 11, 12

No. 93-1294

In The

Supreme Court of the United States

October Term, 1993

GRAYDON L. GIBSON, OLETA GIBSON,

Petitioners,

v.

DALLAS COUNTY EDUCATION DISTRICT,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

TO THE UNITED STATES SUPREME COURT:

Dallas County Education District, Attorney General of Texas, and the Texas Education Agency file this Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, asking this court to deny the petition for writ of certiorari to review the opinion issued on January 5, 1994 by the United States Court of Appeals for the Fifth Circuit. In support of this request, Respondents would respectfully show the Court as follows:

JURISDICTION

Jurisdiction is based upon 28 U.S.C. § 1254(1)(1993).

STATEMENT OF THE CASE

On April 15, 1991, the 72nd Texas Legislature passed Senate Bill 351, effective August 26, 1991, which amended the Texas Education Code and the Texas Tax Code (Acts of 1991, 72nd Leg., 1st C.S., Ch. 20, 1991, Tex. Gen. Laws 381, amended by Act of May 27, 1991, Tex. Gen. Laws 1475; Tex. Educ. Code § 20.941 et seq.) This legislation amended the State public school finance system and created 188 County Education Districts (CEDs), a new type of taxing unit, which imposed ad valorem taxes, beginning with tax year 1991.

On January 30, 1992, the Texas Supreme Court held that the Texas public school finance system levied a State ad valorem tax in violation of Article VIII, § 1(e) of the Texas Constitution, and permitted County Education Districts ("CEDs") to levy ad valorem taxes without prior vote or approval in violation of Article VII, § 3 of the Texas Constitution. *Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.*, 826 S.W.2d 489, 524 (Tex. 1992) (*Edgewood III*). Because the State legislature was not in regular session, the Texas Supreme Court chose to defer the effect of its relief for seventeen months to avoid disruption of public school operations and to enable the legislature to consider all options fully. *Id.* at 522. The Texas Supreme Court directed the State district judge to reissue an injunction to prohibit the State Commissioner of Education and Comptroller from giving

effect to certain provisions of the Texas Education Code, but stayed the effect of the prohibition until June 1, 1993. *Id.* at 523 and n. 42, 524. The Texas Supreme Court held that its ruling was only to be applied prospectively to the 1993 tax year and was not to be used as a defense to the payment of the 1991 and 1992 CED taxes. *Id.* at 522.[1]

Petitioners filed suit against the Dallas County Education District to recover 1991 and 1992 ad valorem taxes paid to the CED on the basis that the retention of the CED taxes violated the due process clause of the Fourteenth Amendment to the United States Constitution. Petitioners also sought class action certification pursuant to Rule 23 of the Federal Civil Procedure. The Texas Attorney General and the Texas Education Agency intervened in this action.

The United States District Court for the Northern District of Texas dismissed the Petitioners' complaint on

---

[1] The Texas public school finance system has since been amended and the CED's abolished. (Senate Bill No. 7, Acts of 1993, 73 Leg., R.S., ch. 347 § 413(1), eff. May 31, 1993, 1993 Tex. Sess. Law Serv. 8 (Vernon), to be codified to TEX. EDUC. CODE; abolished the CEDs and required the transfer of the funds, the contracts, assets and liabilities of the CEDs to the component Independent School Districts in the manner provided by rule of the Texas Commissioner of Education. The Texas Commissioner of Education promulgated Rule 61.1001 of the Texas Education Agency which required the appointment of a successor-in-interest). 18 Tex.Reg. 5697 (1993) codified at 19 TEX. ADMIN. CODE § 61.1001) (TEX EDUC. AGENCY). Pursuant to Texas Education Agency Rule 61.1001, the Dallas CED appointed the Irving Independent School District as the successor in interest to collect taxes and pay debts of the Dallas CED.

the basis of res judicata. The District Court below determined that the judgment in *Smith v. Travis County Education District*, 968 F.2d 453, 455-56 (5th Cir. 1992)[2] barred the Petitioners from bringing the action in Federal District Court because in that case the Fifth Circuit Court of Appeals held that the Tax Injunction Act, 28 U.S.C. § 1341, barred the District Court from exercising subject matter jurisdiction over identical taxpayer claims. On January 5, 1994, the Court of Appeals for the Fifth Circuit affirmed the lower court's dismissal, holding the Tax Injunction Act, 28 U.S.C. § 1341, barred the Petitioners' suit for a refund of state ad valorem taxes.

SUMMARY OF THE ARGUMENT

The Fifth Circuit's application of the Tax Injunction Act, 28 U.S.C. § 1341, to bar Petitioners' suit for a refund of the 1991 and 1992 CED taxes does not warrant review by this Court because the decision correctly applies this Court's precedent and there is no circuit conflict. The Court of Appeals correctly applied the Tax Injunction Act

[2] In *Smith*, two separate groups of Texas taxpayers filed suit against the Travis County Education District and all other CEDs in the Federal District Court, seeking a refund of the 1991 and 1992 CED taxes on the basis that the CED taxes violated the due process clause of the Fourteenth Amendment to the U.S. Constitution. The Fifth Circuit held that the Tax Injunction Act barred the District Court from exercising subject matter jurisdiction over the taxpayer class action. The *Smith* court designated the Plaintiffs' class as consisting of the 1991 and 1992 ad valorem taxpayers in Texas and certified the Defendant class as comprising the Texas CEDs.

because no Federal question was presented for review and because Texas law provides adequate judicial procedures for the Petitioners to bring their Federal claims. The issue is not whether the retention of the CED tax violates the due process clause of the United States Constitution, but rather whether the Tax Injunction Act and the Eleventh Amendment deprive the Court of jurisdiction. The Petitioners incorrectly focus on whether the taxpayers will receive relief in State court rather than the inquiry required under the Tax Injunction Act or whether Texas law provides a plain, speedy and efficient remedy. Petitioners' assumption that the CED taxes were paid under duress in violation of Federal law, and that Texas law fails to provide an adequate remedy, is unsubstantiated and clearly erroneous.

ARGUMENT

I. TAX INJUNCTION ACT BARS PETITIONERS' CLAIMS

This Court has consistently held that the Tax Injunction Act bars Federal district courts from asserting jurisdiction in cases challenging State Tax systems, unless the State fails to supply a plain, speedy and efficient remedy for the taxpayers' claim. *California v. Grace Brethren Church*, 457 U.S. 393, 408 (1982); *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 299 (1943). The Act was intended to drastically limit federal interference with so important a local concern as the collection of taxes. *Rosewell v. LaSalle Nat'l. Bank*, 450 U.S. 503, 522 (1981). The Act imposes an equitable duty on Federal district courts to

refrain from exercising jurisdiction over claims arising from State revenue collection. *McQueen v. Bullock*, 907 F.2d 1544 (5th Cir. 1990), *cert. denied*, 499 U.S. 919 (1991). Further, taxpayers are barred by the principles of comity from asserting actions against the validity of State tax systems in Federal court. *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 116 (1981). Therefore, the Tax Injunction Act deprived the district court below from asserting jurisdiction unless it found that the Texas law failed to supply a plain, speedy and efficient remedy for the Petitioners' claims.

Since the Tax Injunction Act is intended to be a broad jurisdictional impediment to Federal Court interference with the administration of State tax systems, the District Court below was correct in dismissing Petitioners' claims unless Texas law failed to offer an effective remedy. This Court stated the requirements of a plain, speedy and efficient remedy in *Rosewell*, 450 U.S. at 512-27. The Court first noted that § 1341 on its face requires a State-Court remedy that meets certain minimal procedural criteria, a standard which is also expressed as allowing for "a full hearing and judicial determination at which the taxpayer may raise any and all constitutional objections to the tax". The inquiry focuses on whether a State provides a procedural vehicle that affords taxpayers the opportunity to raise their Federal Constitution claims. *Rosewell*, 450 U.S. at 512-13. A State provides a plain, speedy and efficient remedy when it provides taxpayers with a full hearing and judicial determination, with ultimate review, available in the United States Supreme Court, pursuant to 28 U.S.C. § 1257 (1993). *Rosewell*, 450 U.S. at 514.

The Petitioners do not allege that the State fails to furnish a procedural avenue for them to pursue their Federal due process claims. Rather, the taxpayers argue that the Texas Supreme Court's decision in *Edgewood III* eliminates the possibility of a State remedy by specifying that its ruling could not be used as a defense to the payment of taxes under the invalidated public school finance system. This argument provides no basis for circumventing the jurisdictional bar imposed by the Tax Injunction Act. *See Smith v. Travis County Educ. Dist.*, 968 F.2d 453 (5th Cir. 1992); *Franchise Tax Bd. v. Alcan Aluminum*, 493 U.S. 331, 340-41 (1990); *Rosewell*, 450 U.S. at 512-17; *Redd v. Lambert*, 674 F.2d 1032, 1036 (5th Cir. 1982). (There is no indication that Congress intended that the lower Federal Courts would provide supplemental relief whenever a litigant does not receive all of the relief he seeks in State court). As in *Smith*, the Petitioners have not demonstrated that the Texas courts have refused to entertain their Federal claim, nor have they shown that their State remedy is uncertain or speculative.

II. TEXAS TAX CODE PROVIDES EFFECTIVE REMEDY

The Texas tax system which existed prior to the Texas Tax Code qualified as a plain, speedy and efficient remedy for purposes of the Tax Injunction Act. *City of Houston v. Standard Triumph Motor Co.*, 347 F.2d 194, 199 (5th Cir. 1965), *cert. denied*, 382 U.S. 974 (1966). The Texas courts have held that the Texas Tax Code meets the due process requirements of both the United States and Texas

Constitutions. *General Electric Credit Corp. v. Midland Central Appraisal Dist.*, 808 S.W.2d 169, 171-72 (Tex. App. – El Paso 1991), *affirmed in part rev'd in part*, 826 S.W.2d 124 (Tex. 1991); *Brooks v. Bachus*, 661 S.W.2d 288 (Tex. App. – Eastland 1983, writ ref'd n.r.e.); *Texas Architectural Aggregate, Inc. v. Adam*, 690 S.W.2d 640, 643 (Tex. App. – Austin 1985, no writ); *Dallas County Appraisal District v. Lal*, 701 S.W.2d 44, 47 (Tex. App. – Dallas 1985, writ ref'd n.r.e.). (The Tax Code satisfies the due process requirements of the Texas Constitution); *Texas Pipeline Co. v. Anderson*, 100 S.W.2d 754 (Tex. Civ. App. – Austin 1937, writ ref'd), *cert. denied*, 302 U.S. 724 (1937).[3]

The Tax Injunction Act is applicable to Petitioners because pre-deprivation and post-deprivation procedural safeguards exist. The Texas Tax Code provided Petitioners with a plain, speedy and efficient remedy for purposes of the Tax Injunction Act. Chapters 41 and 42 of the Texas Tax Code prescribe the administrative and judicial procedures to be followed by a taxpayer to challenge the appraised value, situs, ownership, constitutionality or any other action which adversely affects the property owner.[4] A taxpayer who follows the prescribed procedures of the Texas Tax Code is not foreclosed from

---

[3] The due process guarantees set forth in the Open Courts provision of the Texas Constitution also assure that Texas citizens who bring common law actions will not unreasonably be denied access to the courts. *Sax v. Votteler*, 648 S.W.2d 661, 664 (Tex. 1983).

[4] Under the Texas Tax Code system, the County Appraisal District, a political subdivision, is charged with the responsibility of appraising property and administering exemptions for ad valorem taxation on a county-wide basis. A taxpayer may protest any action by the Appraisal District to the Appraisal

raising the issue of constitutionality.[5] Thus, Petitioners may attack any tax assessment as long as they follow the statutory procedure. A comparison of the procedures of the Texas Tax Code with those procedures involved in *Fair Assessment* and in *Rosewell* establishes that the Texas property tax system does provide a plain, speedy and efficient remedy, precluding Federal jurisdiction.

Petitioners have a pre-deprivation remedy available to contest the CED tax by filing suit in accordance with the Texas Tax Code. In fact, Petitioners could have joined *Edgewood III* with their claims that the CED tax violated the Texas Constitution and that the collection of the CED taxes violated Federal due process. Entitlement of due process with respect to deprivations of property can either arise in a pre-deprivation context or in a post-deprivation stage; but the United States Constitution does not require due process at both stages. *Woods v. Federal Home Loan Bank Board,* 826 F.2d 1400 (5th Cir. 1987), *cert. denied,* 108 S. Ct. 1221 (1988).

III. MCKESSON INAPPLICABLE

Since Petitioners were not foreclosed from asserting their Federal claims at the pre-deprivation stage, *McKesson v. Division of Alcoholic Beverages and Tobacco,* 496

Review Board, an administrative tribunal created to determine taxpayer protests. Chapter 42 of the Texas Tax Code then provides for a right of appeal for the dissatisfied taxpayer to the State district court.

[5] Section 41.41(9) of the Texas Tax Code permits the property owner to protest any action which adversely affects and applies to the property owner.

U.S. 18 (1990) is inapplicable. There, taxpayers challenged a Florida excise tax as discriminatory because it favored manufacturers and distributors of beverages made from products grown in Florida. After exhausting the State administrative avenues, the taxpayers filed suit for refund of the excise tax. The Florida Supreme Court held the tax to have an unconstitutional discriminatory effect in violation of the commerce clause of the United States Constitution, Article VIII, clause 3, but affirmed the denial of the refund of the excess taxes paid under the discriminatory system. The taxpayers exhausted the appellate process and on appeal to this Court, Justice Brennan stated,

> "We have repeatedly and without question accepted jurisdiction to review issues of federal law arising in suits brought against States in state court; indeed, we frequently have entertained cases analogous to this one, where a taxpayer who had brought a refund action in state court against the State asked us to reverse an adverse state judicial decision premised upon federal law."

McKesson, 496 U.S. 18 at 29.

Thus, *McKesson* represents this Court's exercise of appellate jurisdiction over cases arising in state court that present a federal question.

There are important distinctions between *McKesson* and this case. First, the *McKesson* taxpayers completely exhausted the State remedies before appealing to the Federal courts. Here, the Petitioners have made no effort to exhaust available State remedies before resorting to the

Federal courts. Next, the *McKesson* taxpayers sought protection from discrimination by a State in favor of local business in violation of the commerce clause of the U.S. Constitution. In *McKesson*, the Florida court refused to protect the right guaranteed to the taxpayers by the United States Constitution. In the instant case, the Petitioners seek a refund of an invalid tax under the Texas Constitution and thus, the asserted right is one guaranteed by the Texas Constitution, not the Federal Constitution. Finally, *McKesson* demonstrates that the Tax Injunction Act operates only to deprive the Federal district courts of jurisdiction over State tax disputes. This Court always retains jurisdiction to entertain an appeal from the State court of last resort on a showing of deprivation of federally protected rights. The Petitioners, however, are attempting to shortcut the procedure properly followed by the *McKesson* taxpayers. Inherent in the Petitioners due process claims is the assumption that the State Court would improperly decide the federal question were it given the opportunity. This assumption, and the Petitioners' resultant behavior, is precisely what the Tax Injunction Act prohibits.

IV. ABSENCE OF FEDERAL QUESTION

Petitioners have not presented this Court with a federal question. The presence or absence of a federal claim hinges on *McKesson*. When a State system of taxation is struck down as being in violation of the United States Constitution, Fourteenth Amendment due process rights arise. On the other hand, if the basis for the tax being struck down was State law, the termination or retroactivity or prospectivity of that decision is within the sole

authority of the State itself, and no federal question arises under the Fourteenth Amendment. *American Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167 (1990); *Great Northern Ry. Co. v. Sunburst Oil and Refinery Co.*, 287 U.S. 358 (1932); *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). When questions of State law are at issue, this Court has recognized a State Court's right to give its ruling prospective or retrospective application. The Texas Supreme Court's determination that it must balance the demands of the Texas Constitution which require the Legislature make provisions for an efficient system of public education with the prohibitions of a tax levy without local elections, by deferring the effect of its ruling in *Edgewood III* until June 1, 1993, is purely a State matter. The Texas Supreme Court choice of remedy does not create a federal question. Thus, no federal question is presented and the Court of Appeals was correct in applying the Tax Injunction Act.

V. ELEVENTH AMENDMENT BARS PETITIONERS' CLAIMS

The Petitioners' claims are also barred by the Eleventh Amendment to the United States Constitution. The Texas Supreme Court declared in *Edgewood III* that the CED was an invalid State ad valorem tax. The CEDs were essentially an arm of the State for the purposes of collecting a state ad valorem tax. Once the tax was held to be a state ad valorem tax, the entire public school finance system for the State of Texas was declared unconstitutional by the Texas Supreme Court. The Eleventh Amendment bars suit against State officials when the State is the

real party in interest. Thus the bar of the Eleventh Amendment of the United States Constitution extends to the CED to bar Petitioners' claims. *See Farias v. Bexar County Board of Trustees*, 925 F.2d 866 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 193, 116 L.Ed.2d 153 (1991); *Stem v. Ahern*, 908 F.2d 1, 4 (5th Cir. 1990), *cert. denied*, 498 U.S. 1069 (1991).

CONCLUSION

The Fifth Circuit's application of the Tax Injunction Act, 28 U.S.C. § 1341, to bar Petitioners' suit for a refund of the CED taxes does not warrant review by this Court.

The Court of Appeals correctly applied this Court's precedent and there was no Circuit conflict.

Respectfully submitted,

NICHOLS, JACKSON, DILLARD,
HAGER & SMITH, L.L.P.

PETER G. SMITH
Bar Card No. 18664300

ROBERT L. DILLARD III
Bar Card No. 05870000
(PGS/jd)

1800 Lincoln Plaza
500 North Akard
Dallas, Texas 75201

(214) 954-3333
(214) 954-3334 FAX

Attorneys for Respondents

DAN MORALES
Attorney General of Texas

JORGE VEGA
First Assistant Attorney General

TONI HUNTER
Chief, General Litigation Division
Bar No. 10295900
Assistant Attorney General

General Litigation Division
P. O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 463-2120
(512) 320-0667 FAX

Attorneys for Intervenors